1949

Michael Benjamin, Arthur O. Lloyd, Edward Davis, Forrest H. Greene, and Weldon Nollkamper v. Bert Lietz : Brief of Respondent

Utah Supreme Court

Clyde, Mecham and White; Attorneys for Plaintiffs;

7330

Case No. 7330

IN THE SUPREME COURT
of the
STATE OF UTAH

MICHAEL BENJAMIN, et al,
Respondents,

vs.

BERT LIETZ,
Appellant.

BRIEF OF RESPONDENT

CLYDE, MECHAM and WHITE
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BRIEF OF RESPONDENT

This is a suit in equity to enjoin the defendent, Bert Lietz, from operating his planing mill so as to cause loud and unusual noises in the late evening and early morning hours and on Sundays. The trial court found the issues, both of fact and of law, in favor of the plaintiffs and the defendent appealed.

The statement of facts by the appellant is incomplete and in some instances inaccurate. There are some conflicts in the evidence, but the trial court resolved those conflicts in favor of the plaintiffs (respondents). Ad-

mittedly, the Supreme Court in an equity case can and does review the evidence. Art. VII, Sec. 9, Utah Constitution. However, the court has adopted a consistent judicial policy of resolving all doubts in favor of the findings of the trial court because it had the opportunity to view the witnesses. *Stanley v. Stanley,* 97 Utah 520, 94 P. 2d. 465; *Baldwin v. Nielson,* 110 Utah 172, 170 P. 2d. 179; *Maxfield v. Sansbury,* 110 Utah 280, 172 P. 2d. 122; *Graham v. Street,* 109 Utah 460, 166 P. 2d. 524. For example in the *Maxfield v. Sansbury* case the court said:

> "This is an action in equity in which it becomes our duty to determine questions of fact as well as questions of law, but unless the evidence clearly preponderates against the findings and judgment by the district court, its decision will stand."

Thus, where the evidence is in conflict, we assume that under the rule announced by the above cases, the Supreme Court will accept the findings of the trial court.

THE EVIDENCE

The defendant owns and operates a planing mill at 2032 South 10th East, Salt Lake City, Utah. (R. 57). The plaintiffs and their families occupy for residential purposes property immediately adjacent to the planing mill. (R. 69, 75, 98, 102). Prior to 1943 the defendant operated his planing mill during the day time, but after the normal work day, there were no disturbing noises. The trial court so found (R. 41, finding 7) and the find-

ing is abundantly supported by the evidence. Forrest Howard Green moved into the neighborhood in January of 1940. (R. 75). When he first moved there, he was not disturbed by any noises during the nighttime, but in 1943 when Mr. Lietz started to make boxes the noise continued until about eleven o'clock at night. (R. 70-71). Michael Benjamin married the defendant's sister and moved into the area in 1934. (R. 75, 77). All was quiet and peaceful then. (R. 77). In 1943, the defendant got an order to manufacture boxes and commenced evening work with large crews of men. (R. 79, 85). There was never any shift work prior to 1943. (R. 88). Mrs. Benjamin is the defendant's sister. She had lived in the area in question all of her life. (R. 107). She testified that from 1928 until the war the defendant never worked a shift at night. (R. 107). There wasn't any noise at night prior to 1943 that was loud enough to disturb them. (R. 108).

In 1943 the defendant became engaged in war work and started to use an early evening shift that would start at 4:30 or 5:00 p.m. and work until 10:00 or 11:00 p.m. (R. 70, 78, 82, 108). The defendant also constructed a new cinder block building and filled it with machinery, much of which was new equipment. This building was constructed according to the defendant in February of 1944 (R. 58) and according to Benjamin in 1945 (R. 86). The difference is not material for in any event it was 1944 or later. There was much new machinery acquired for the new building. When counsel for plaintiffs examined the defendant on direct examination

he stated that much of the equipment shown on exhibit A was new. (R. 58-62). He later said that all of it was in replacement of old machinery except a re-saw machine. (R. 150, 158). Then later he admitted again that much of the machinery was new and not a replacement. The new machinery consisted of a re-saw machine (R. 162), the dust collector (R. 163), a moulder (R. 164), a blower (R. 164), a planer (R. 164), and other machines like a planer (R. 165) were replaced with heavier equipment. The installed capacity was increased from 125 horse power in 1927 to 149½ at date of trial. (R. 117). The defendant also had never prior to about 1947 had any machinery located on the outside of his buildings. (R. 161). But in 1947 he poured a cement platform on the south and west sides of the new cinder block building and installed machinery thereon. (R. 61-62).

The night work done by the late shift causes very loud and disturbing noises. This was testified to by Green (R. 71) who said; "They worked with great rapidity, and the noise was incessant and to the extent that we could hear it, at least, it disturbed us; we couldn't sleep." The noise was so loud that it could not be shut out of the house by closing the windows (R. 71). It continued until about 11 p.m. (R. 72). In the spring of 1948 the defendant would run the outside machinery as early as 4:00 a.m. in the morning and this was a frequent occurrence. (R. 73). Benjamin described the noise from the boxes, and also mentioned the operating of a saw filer which made a grating noise of carborundum stone rubbing on steel, (R. 80) and the piercing noise of the planer

which could be heard for five blocks (R. 87). Mrs. Benjamin said the noise was so loud and continuous that it almost drove her crazy. (R. 108). It has been so bad that the Benjamins were contemplating selling their home to get away from it (R. 92). It has been so bad at nights that they have left the house to get away from it. (R. 83). Peterson compared the noise of the planer with a siren (R. 94) and said that it was a noise that would be very irritating to him. (R. 95). Arthur Lloyd said the noise was loud and that it disturbed him very much. (R. 99). The noise is described in detail by the various witnesses and there can be no doubt that it was loud, unusual and penetrating as was found by the court. (R. 40, finding 3).

The defendant has been requested to stop the noises in the evening and early morning hours and on Sunday, but he has refused to do so. (R. 82). In fact while the defendant was under a court order to shut the machinery off at 7:00 p.m. he operated the planer one night until 7:31 p.m. (R. 95). (Court order R. 16). He also had men working in the shop pounding on boards as late as 1:30 in the morning, (R. 112) in violation of the court order. There was one order to show cause, but it was dismissed after the defendant was admonished, (R. 20-25) and the court made its instruction more explicit (R. 25). Still within a matter of 45 days the defendant ignored the order and operated the big planer located outside the building until 7:31. (R. 95). There is thus ample evidence that injunctive action is necessary.

In addition it should be noted that the mill is located in a commercial zone where the operation of a planing mill "using in excess of 50 horsepower" is prohibited. (See section 6720 of Ordinance as pleaded in amended complaint and admitted in evidence by stipulation (R. 31, 32, 35 and 168). A non-conforming use was permitted if the mill were in existence prior to 1927 when the ordinance was enacted. The mill in question was installed prior to 1927 (R. 57). But section 6728 permitted the extension of the use only "throughout the building; provided that no structural alterations are made therein." If the building were destroyed by fire, explosion or act of God, etc., to the extent of sixty per cent of its assessed value, it could not be reconstructed. The obvious purpose of the non-conforming use section being to tolerate existing uses, but to prohibit their expansion or rebuilding. The defendant increased his installed horsepower after 1927 from 125 to 149½ (R. 117). He constructed a new or additional building and continued to use the old building also. (R. 58). He poured a cement platform on the outside of the new building and installed machinery theron. (R. 61 and 68). The rated capacity of his plant or mill in 1947 was 57 KW or over seventy horsepower. This is shown by Exhibit B as explained by witness Shaw. (R. 127, 126). There was a meter installed on the mill which measured the highest use of electrical energy during a fifteen minute average each month and in 1947 there was not a single month that the use was under fifty horsepower. (Exhibit B). Whenever Exhibit B shows a use of above 35 KW it is above 50

horsepower and reference to exhibit B will show that the lowest month in 1947 was June with 36 KW. The appellant states in his brief that in 1947 the power use was always under fifty horsepower and cites the record at page 123 to support the statement. (Brief page 9). Mr. Shaw did so state, but this was an obvious error corrected both by Mr. Shaw and also by exhibit B which shows the monthly uses to be all above fifty horsepower. In 1948 six of the months shown were above fifty horsepower and only five were below. (Exhibit B). The court found and the foregoing evidence supports the finding that the defendant's mill has been "using in excess of fifty horsepower" within the meaning of the ordinance and that the mill with such use of electrical power has been enlarged and altered, and that the capacity was increased in violation of the ordinance.

Appellant in his brief states at page ten that plaintiffs did not complain of the noise occuring on Sundays. This is not the evidence. Mrs. Benjamin said that the noise on Sundays and during the week nights was very bad and that they would be satisfied if he would "quit at a reasonable hour during the week and not operate on Sundays." (R. 110).

Appellant states at page 9 of his brief that the defendant's father prior to 1927 and the defendant since then have worked crews at night in the mill. There is evidence to this effect. (R. 119). But there is also evidence to the contrary, (R. 108) and the trial court resolved this conflict in favor of the plaintiffs. It is stated

that a Merrill Appliance Company employee was not bothered by the noise (appellant's brief, R. 10). However, this employee did not work in the vicinity at night (R. 134) nor did he live in the area.

ARGUMENT

I. THE COMPLAINT STATES A CAUSE OF ACTION.

Appellant's first and primary contention is that the complaint fails to state a cause of action. In this regard there are two recent Utah cases, neither of which is cited by appellant, and both of which support the theory of the plaintiffs. They are *Thompson v. Anderson,* 107 Utah 331, 153 P. 2d. 665 and *Brough v. Ute Stampede Ass'n,* 105 Utah 446, 142 P. 2d. 670. In the Thompson v. Anderson case the first assignment of error questioned the sufficiency of the complaint. The court noted that the complaint alleged: (1) that the parties lived in adjoining houses; (2) that defendant operated a business on property located immediately to the rear of plaintiffs residence; (3) that the conduct of defendant's business is a nuisance in that it causes "loud and unusual noise from power driven saws. . . . loud slaming of doors during the night time; hammering during the daytime and the night time; sound equipment which caused 'loud, unusual and shrieking noises'; loud and unusual noises of large vacuum cleaners;" (4) notice to the defendant of the disturbance; and (5) his refusal to abate it." The

trial court overruled a general demurrer. This was assigned as error.

As in the instant case, emphasis was there placed by the defendant upon the fact that the business in question was a lawful business. Said the court:

> "Firstly, defendant points out that there is no complaint that defendant's business is not a a lawful business, and that the sounds which annoy plaintiffs are not unusual and not the ordinary sounds emanating from such a business as defendant is conducting. But even sounds normally inherent in the nature of a business may under some circumstances constitute a nuisance. In Brough v. Ute Stampede Ass'n, 105 Utah 446, 142 P. 2d. 670, 674, it was not alleged or shown that the noises of which complaint was made were any but the usual noises attendant upon a carnival. The projected business was lawful, had in fact been specifically licensed by the city council in past years, and yet we affirmed the judgment enjoining the holding of the carnival in front of plaintiff's property. . . ."

The court then expressly held that the complaint stated a cause of action and that the general demurrer was properly overruled. Every one of the five allegations noted by the court in Thompson v. Anderson, supra, is set forth in the complaint here. (1) That defendant operates a planing mill in 2032 South 10th East, Salt Lake City, Utah, (paragraph II) and each of the plaintiffs is in lawful possession of property adjacent to the planing mill and each uses the property for residential

purposes. The particular address of each plaintiff is given. (paragraph VI and VII). (2) That defendant operates the planing mill (paragraphs II, III and IV). (3) That the operation of the mill by defendant causes "loud and unusual noises which result from the operation of woodworking machinery" (paragraph III) that the machinery is operated substantially every night between 6:00 and 10:00 p.m. and on occasions to later hours, (paragraph IV); that the noises can be heard several blocks from the mill (paragraph IV); that it causes dust and shavings to blow onto plaintiffs' premises, (paragraph IV); that the noise is so loud as to interfere and it does interfere with the peace, quiet and enjoyment of their homes, interferes with normal sleep and causes great disturbance and discomfort to each of the plaintiffs and his family. (paragraph VIII). (4) That plaintiffs have demanded that the defendant cease his night operations (paragraph IX). (5) That defendant refused (paragraph IX). In addition it is alleged that prior to 1943 the mill was not operated at nights or on Sundays; that all of the plaintiffs' property was occupied for residential purposes prior to 1943; that after 1943 the noise complained of started. Thus, every element alleged in the Thompson v. Anderson case, Supra, is alleged here and more. We consider the Thompson v. Anderson case to be directly in point and to justify completely our contention that the complaint states a cause of action.

Aside from the Thompson case, supra, it seems clear that the making of loud and unusual noises in the night-

time is a nuisance. Section 104-56-1, U.C.A. 1943, provides:

> "Anything which is injurious to health, or indecent or offensive to the senses; or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated and damages may also be recovered."

This statute was construed in *Brough* v. *Ute Stampede Ass'n,* supra 105 Utah 446, 142 P. 2d. 670. Our case is within the cases and also the statute. Noises which in the day time would be all right may be and often do become a nuisance if made during the nighttime. The two Utah cases cited above so hold. The Utah cases are in accord with the overwhelming weight of authority. See for example *Rose Freidman v. Isadore Keil,* 166 Atl. 194 86 A.L.R. 995; *Higgins v. Decorah Produce Company,* 242 N.W. 109 (Iowa) and annotation at 86 A.L.R. 998.

We submit that even without the ordinance and the alleged violation of it the complaint states a cause of action. We will defer our discussion of the ordinance until later and then discuss the allegation concerning it as well as its construction.

There are two other matters to which we should like to direct the court's attention in its determination of

whether or not the complaint states a cause of action. First, the contention that it does not is made for the first time on appeal. Admittedly this is an objection that can be made at anytime, but if made for the first time on appeal it is looked upon with disfavor and every resonable presumption must be made in favor of the complaint. Secondly, where evidence is admitted without objection, the Supreme Court will assume that any issues covered by the evidence but not covered by the pleading is litigated by mutual consent. Thus if the evidence shows a grounds for relief and it came in without objection, the decision could stand even if it were not supported by the pleadings. See *Jenkins v. Jenkins,* 107 Utah 239, 153 P. 2d. 262; and cases cited therein. In that case the complaint was for a divorce. The evidence showed that there had never been a valid marriage. The evidence was all in and the court granted an annulment, fixed custody of children and attorney's fees—all without pleadings to support it. This was affirmed, the court saying:

> "Where the parties consent to the litigation of an issue not properly raised by the pleadings and the court hears the evidence adduced thereon and determines the merits of the issue thus joined, neither party is in a position to complain that such issue was not strictly within pleadings."

We submit that the complaint is clearly sufficient as against the contention raised for the first time on appeal that it does not state a cause of action.

CONTENTION OF THE APPELLANT AS TO SUFFICIENCY OF COMPLAINT.

(a) "Lawful Business" Argument.

We have difficulty determining what it is contended is missing in the complaint to make it state a cause of action. The quotation on page 19 of the brief does not refer to a case such as this. The complaint did not seek, nor did the trial court grant, an absolute injunction against the operation of the mill. It permitted its operation during a normal work day from 7:30 a.m. until 6:00 p.m. It enjoined the operation during the evening night and early morning hours.

The appellant infers that because the operation of a planing mill is a lawful business, it can operate all night and make as much noise as a normal planing mill will make. Appellant states at page 18 of his brief:

> "A planing mill means lumber will be sawed and planed. Necessarily that means noise, but unless machinery is running smoothly and unnecessary vibration eliminated, the planing mill is not efficient and must fail."

In his answer and again at the trial defendant emphasized that the buildings were built under city permits and War Production Board orders. He seems to assume that since a planing mill is a lawful business it can operate night and day so long as it makes no more noise than a normal mill. Such simply is not the law. Both of the two Utah cases, *Thompson v. Anderson, supra,* and

Brough v. Ute Stampede Ass'n, supra, held that a lawful business may be so operated as to make it a nuisance. In the Thompson case the court said:

> "But even sounds normally inherent in the nature of a business may under some circumstances constitute a nuisance."

and the court affirmed an injunction to prohibit the operation of power driven saws and sound equipment. In that case the court said that it was all right if defendant tested his sound equipment providing the tests were for infrequent periods of not over five minutes each and provided the noise was confined to the daytime. The court went on to say:

> "The court makes a differentiation between noises during the night and those during the day, and takes notice of the fact that what might be a nuisance if occuring during the nighttime, would not be so during the daytime."

This distinction would seem to answer completely the contention that there is no basis for closing the mill in so far as loud noises are concerned after 6:00 p.m. and until 7:30 a.m. when people normally desire to enjoy the peace and quiet of their home.

The Brough case, supra, enlarges upon the idea that even a lawful business may be enjoined because the noise therefrom interferes with the peaceful use of adjacent property. Noises may or may not be nuisances depending upon the times and places in which they occur. The

court further stated that the fact that the business was lawful and even licensed by the city could not prevent it from being an actionable nuisance.

In the Thompson case, supra, the court notes that where equipment is operated within the enclosure of a building it may not be nuisance, but that where it is operated on the outside it may be. In that case it was speaking of a vacuum cleaner and said it would be all right if its operation were confined to the daytime and to a building.

(b) Argument that Plaintiffs "moved to the Nuisance."

There is an intimation that appellant contends that plaintiffs have no cause of action because the planing mill existed in 1900 and the plaintiffs knowingly moved into the vicinity of it. This argument is unsound because complaint alleges, the evidence shows and the court found that the mill did not operate after 6:00 p.m. prior to 1943. In this regard the general law is well stated in 39 Am. Jur. 472, Section 197 as follows:

> "As a rule, it is no justification for maintaining a nuisance that the party complaining of it came voluntarily within its reach. Thus, according to the weight of authority, the fact that a person voluntarily comes to a nuisance by moving into the sphere of its injurious effect, or by purchasing adjoining property or erecting a residence or building in the vicinity after the nuisance

> is created, does not prevent him from recovering damages for injuries sustained therefrom, or deprive him of the right to enjoin its maintenance, *especially where, by reason of changes in the structure or business complained of, the annoyance has since been increased.*'' (Italics added)

See also *Higgins vs. Decorah Produce Co.* supra, 242 N.W. 109; *Freidman v. Keil,* supra, 166 Atl. 194, 86 A.L.R. 995.

(c) Sunday Closing.

The two cases cited by appellant which hold Sunday closing laws to be unconstitutional because discriminatory are not in point. (Appellants Brief, p. 19). They simply held that the statute or ordinance in question was unconstitutional because it permitted certain businesses to stay open and closed others and that there was no reasonable basis for the distinction made. Both cases, however, recognized that Sunday is a day of rest and that if there were not unreasonable discrimination, businesses could be closed on Sundays. The only thing in those cases which we deem helpful here is the recognition of Sunday as a day of rest. That is exactly what the trial court did here. It recognized Sunday as a day of rest and enjoined the defendant from causing loud, unusual and disturbing noises on that day which would interfere with the peace and enjoyment by plaintiffs of their properties.

II. THE DEFENDANT WAS OPERATING IN VIOLATION OF THE ORDINANCE.

The appellant urges that the portion of the decree limiting him to fifty horsepower is erroneous because we did not show that he had not used more than fifty horsepower prior to 1927. It seems to us that in making this argument the appellant completely misses our contention in regard to the ordinance. We do not contend that if the appellant would abandon his new building, the cement platform and would place all the new equipment in his old building that he could not use more than fifty horsepower. *To the contrary, we admit the he could.* But he is not seeking to do so. He has enlarged his building, constructed a new platform and installed new machinery thereon. This enlargement the ordinance prohibits.

As we construe the ordinance it prohibits new planing mills "using more than fifty horsepower" from building in a commercial zone. Mills already in existence in 1927 were permitted to continue and to enlarge "*throughout the building,* provided that no structural alterations are made therein." We confess that under this ordinance the defendant could have expanded to use three hundred horsepower if he could have done so while confining himself to the original building and without sturctural alterations. We deny, however, that he could expand his building or construct a new platform and install new machinery throughout the new structures. He could, under the ordinance, expand only to the confines

of his building as it existed in 1927. If it burned down, he could not rebuild it. If it were otherwise damaged to the extent of sixty per cent of its assessed value, it could not be repaired. Expansions which called for structural alterations could not be made.

It is absolutey immaterial how many horsepower appellant used prior to 1927. If he desires to confine himself to the old building, we concede that there is no restriction placed on him by the ordinance as to the number of horsepower he may use. But since he is operating a plant using more than fifty horsepower, he was prohibited from expanding beyond his original building, and when he did so he violated the ordinance. He was, therefore, properly enjoined from using more than fifty horsepower in his expanded plant—for only by so limiting his horsepower would the new building, the cement platform and the new machinery installations therein be legal.

There can be no doubt that his plant is now using more than fifty horsepower within the meaning of the ordinance. If the ordinance means installed capacity of the machinery the mill is above fifty horsepower because the installed capacity is 149½ horsepower according to the appellant's own testimony. (R. 117). If the ordinance means the rated capacity of the plant it is above fifty horsepower for in 1947 the rated capacity was 57 KW (over seventy horsepower). In 1948 the rated capacity was 48 KW (over sixty horsepower). (R. Exhibit B). If it means the amount of electrical energy used it is over

fifty horsepower for there was not a single month in 1947 that the mill did not average for the one fifteen minute period measured in excess of fifty horsepower. In 1948 six out of the eleven months of operation showed an average of over fifty horsepower. (Exhibit B). The inference sought to be given by the defendant that this heavy use probably was simply turning on several machines all at once causing a heavy, but momentary, load is not sound. The figures given by Exhibit B reflect an average use over a fifteen minute period—not a momentary use. It narrows down to this: Either the defendant was not using fifty horsepower in 1944 or 1945 when he started his expansion program—and has thus now increased it beyond fifty horsepower which would be illegal; or he was using fifty horsepower in 1944 and then he illegally expanded a fifty horsepower mill into a new building and added new machinery. One of these two things must be correct and we do not care which. If he was not using fifty horsepower in 1927, then he has since illegally expanded so that he now does. If he was using fifty horsepower in 1927, then he illegally expanded beyond the confines of his existing building. Both are prohibited by the ordinance. The injunction limiting him to fifty horsepower was entirely justified. If he were not enjoined his past conduct demonstrates that he would continue to expand.

The evidence shows that he also constructed a new building within 100 feet of a dwelling. Since his mill is over fifty horsepower, this was prohibited by ordinance. Sec. 6720) (b), (R. 168).

III. THE CONCLUSIONS OF LAW WERE PROPER.

On page 22 of his brief, appellant contends that conclusion of law number four is erroneous. This conclusion is to the effect that defendant should be permitted to go to his shop to work after 6:00 p.m., but that he must not do work that "will create any noise which will disturb the peace and quiet of the neighborhood, *or which can be heard by the plaintiffs in their homes.*" The objection apparently is to the italicized portion. Of course, an injunctive order of this type must be reasonably construed. In *Thompson v. Anderson,* supra, 107, Utah 331, the objection was made that the order was too broad. The court said:

> "In all cases like the present, where conduct of businesses is enjoined, the injunction must be interpreted reasonably, both by the parties and by the courts. The cardinal principal to be kept in mind at all times is that it is not noise as such, which is enjoined. The injunction goes only to such noises as constitute a nuisance—such noises as annoy the normal individual and interferes with normal use and enjoyment of his property."

Here the appellant had the findings and conclusions served on him on the 18th day of December. They were not entered until December 23. (R. 47). He made no suggested language changes nor did he object to any particular finding or conclusions. He should not be heard to pick out one narrow phrase from the findings, conclusions and decree and complain of it when the reason-

able construction of the whole decree and of the paragraph in question is that unreasonable or unusual noises are enjoined. Certainly that is the fair and reasonable construction of conclusion of Law No. Four. Noises which which will "disturb the peace and quiet of the neighborhood" are enjoined. *The decree itself does not use the particular language* complained of and in the last analysis it is the language of the decree which controls; the conclusions and finding are only helpful in construing the decree in event it is ambiguous.

IV. FINDING THAT THE DEFENDANT WAS GUILTY OF CONTEMPT.

On page 23 of the brief appellant contends that prejudicial error was committed in finding him to be guilty of contempt without a hearing. In the decree the court adjudged that the appellant was guilty of contempt of court. It is true that there was no order to show cause issued against the defendant to cite him for contempt. But it does not follow that he had no hearing on the matter. It developed at the trial that the appellant had been operating his mill in violation of the court order. (R. 95, 112). A previous order to show cause had issued and a hearing had been held at which time the defendant was admonished and the order was explained to him. (R. 25). When it appeared to the court during the trial that the defendant had violated the order again, the court on its own motion found him guilty of contempt of court. It imposed no fine or other punishment and we cannot con-

ceive how this could be prejudicial. But if it were prejudicial, we submit that the court had authority, when the contempt came to its official attention, to take action thereon.

V. OTHER ASSIGNMENTS OF ERROR.

Eleven assignments of error are made. Only five are specifically argued. We assume that the others have been abandoned. As this court said in *Palfreyman v. Bates,* 108 Utah 142, 158 P. 2d. 132:

> "This court does not look with favor upon the cause of a litigant who raises points and casts them in the lap of the court for research and determination, and if this is done, it is within the discretion of the court to refuse to consider them." Citing cases.

We do not desire to prolong this brief answering assignments of error which are not argued. We, therefore, limit ourselves to brief comments on the assignments made but not argued by appellant.

(A) Assignment No. 2 is that the court erred in finding that the increased horsepower increased the noise. The court did not so find. It found that the increased activity of new buildings, outside machinery, increased horsepower, etc., caused an increase in the amount of noise. (R. 40-21). The reference to the record in our statement of the evidence shows that several witnesses testified to this effect and in particular that the

outside planer increased the noise very substantially. For example see (R. 87, 72, 99, 111).

(B) Assignment No. 3 is that the court erred in finding that defendant had never operated the mill after 6:00 p.m. prior to 1943. The finding is that he did go there himself and engaged in work, but it did not cause noise that would disturb the neighborhood. (Finding No. 7, R. 42). This is abundanty supported by the record (R. 75, 77, 85, 88, 107, 108).

The remaining assignments of error are sufficiently answered in our general discussion of the Utah cases under Part I of the brief.

CONCLUSION

We respectfully submit that the decree was properly entered. The plaintiffs sought only relief from the noise. They asked no money damages. They did not seek to have him tear down his new building or to remove his machinery. They just wanted him to confine all of his machines to enclosed buildings and to not operate those which make excessive noise after 6:00 p.m. and until a reasonable hour the next morning so that they could occupy their property for residential purposes. Without the injunction it is clear that the appellant would operate his mill without regard to the welfare of others. If it suited his convenience to make loud noises at 3:00 a.m. he would do so in complete disregard of the rights of others. It is a stronger case than Brough v. Ute Stam-

pede Ass'n, where plaintiff was only harrassed by noise for a few days each year. Here the noise is constant every night the entire year. It also appears to be a stronger case than Thompson v. Anderson, supra, where a small business behind a man's house used power driven equipment. This is a full fledged lumber mill with saws, planers, rippers, etc., which can be heard for blocks. The appellant has been persistant in enlarging his mill and his operations. No one would complain if he went back to his 1943 operation. But in a commercial zone, adjacent to homes, he simply can not expand indefinitely and operate eighteen hours a day in complete disregard of the rights of others.

Respectfully submitted,

CLYDE, MECHAM and WHITE

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